

Open Access for International Criminal Lawyers

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Open Access for International Criminal Lawyers 1

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Abstract 6

This study investigates to what extent Open Access is useful for international criminal lawyers. Free reuse and distribution may be particularly advantageous for the audience in less resourceful countries. And individual authors need visibility to promote their academic reputation. However, many publishers share commercial interests that are not fully consistent with Open Access. This study also explores the extended coverage of Open Access sources pertaining to international criminal law. The inventory of various publishing channels noted in this study shows the great potential of Open Access to users with different interests. In particular, through the availability of a couple of first-rate Open Access journals and free databases supported by international organisations, evidence is found that Open Access is significant in the field of international criminal law. 7
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Keywords 18

copyright – Open Access – online publishing – legal journals – international criminal law – Creative Commons – Legal Tools Database – Social Science Research Network (SSRN) 19
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1 Introduction 22

To introduce the potential of the many sources of Open Access for international criminal law, the following influential definition serves as the starting point: 23
24

By ‘open access’ to [peer-reviewed research literature], we mean its free availability on the public internet, permitting any users to read, 25
26

download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.¹

Reader, reuse and redistribution rights are at the core of this broad definition of Open Access. These rights have a wide impact on the free availability of digital sources and on the general dissemination of knowledge.

The definition given above determines the parameters of the following inventory of various Open Access sources available in the domain of international criminal law. This inventory, which is one of the main elements of this paper, aims to report on the current scope of Open Access as related to international criminal law, which is recently expanding to include works of legal scholarship in the form of journal articles. However, it has to be taken into account that this paper will not so much list common and valuable sources like institutional websites but focus on a couple of outstanding examples like the Legal Tools Database.² An introduction to the potential of Open Access, as illustrated by the Legal Tools Database, precedes comments on other databases, search engines or tools that are probably useful for readers in the field of international criminal law.

Since users may be either readers or authors of publications, the inventory of various sources will show the potential of Open Access to users with different interests. In the interest of both researchers and authors, this study will explore tools that assist with finding Open Access journals as publishing channels. This paper will focus on Open Access journals and not so much on

¹ This definition stems from the 2002 Budapest Open Access Initiative <<http://www.budapestopenaccessinitiative.org/read>>, accessed 12 August 2016. Ten years later, this definition of Open Access was reaffirmed <<http://www.budapestopenaccessinitiative.org/boai-10-recommendations>>, accessed 12 August 2016.

² Cf. A. Bestak-Cruz, 'Searching Through Systems: Research Guide for UN Criminal Tribunals', 40 *International Journal of Legal Information* (2012) 516–582, at p. 530: 'The most valuable source of information for the UN criminal tribunals often tends to be the websites for the tribunals themselves'. And at p. 531: 'it is important to note that the official websites of the tribunals are seen as so central to beginning any research or work related to the systems that it is common practice for lawyers, staff, and administrators of the courts to begin almost every project by first looking to the tribunal websites to begin a search'.

primary source material like case law, as articles and journals describe trends across the criminal tribunals and investigate particular subject areas in further detail.³ A couple of concluding remarks will be preceded by an analysis of the quality of some Open Access journals, a recurring topic that is important to note for all users.

2 Potential of Open Access

The definition of Open Access noted previously includes free reuse and redistribution of materials by anyone, thereby granting free and unrestricted on-line access to academic papers and other sources. Accordingly, Open Access publications are not locked behind an expensive paywall but freely available for viewing and downloading. Therefore, it can safely be assumed that Open Access journals are more readily available to readers than subscription-based journals behind paywalls. In addition, advantages of Open Access for those publishing may include greater efficiency and lower cost in the process of dissemination and access to scholarly research. As will be explained in further detail below, Open Access may benefit the international criminal law field.

By removing price barriers that constrain access to scholarly research papers, Open Access bridges the divide that often separates rich and poor citizens. This could be particularly advantageous for users in less developed countries where traditional access to hard-copy legal materials may be substandard for reasons of infrastructure or finance.⁴ Consequently, it may be stated that the free availability in the public domain will democratise access to information on international criminal law, thus enabling practitioners to find appropriate legal arguments relevant to a case and creating preconditions for criminal justice in materially less resourceful countries and in areas of conflict.⁵ In this

3 Bestafka-Cruz, *ibid.*, p. 535: 'Academic articles and journals are particularly helpful in exploring trends across the criminal tribunals and investigating particular subject areas. The critical nature of these sources lends itself to going in-depth and providing very comprehensive analysis of the structures and ongoing work of the tribunals'.

4 *Ibid.*, pp. 532–533: 'Unless one is fortunate to be in The Hague, Geneva, or some other city with institutions that maintain substantial and comprehensive collections, access to hard-copy materials can be difficult'. Free availability on the public internet may change this inequality. However, the advantages of Open Access are almost absent in environments that are only sporadically powered by electricity or where internet use is expensive.

5 Cf. M. Bergsmo, O. Bekou and A. Jones, 'New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project', 10 *Human Rights Law Review* (2010) 715–729, at p. 723: 'The availability of the Legal Tools serves to level the playing field in the documentation,

context, it does not need much explanation that Open Access will favour practitioners more than academics that have institutional access to paid journals.⁶

The potential of Open Access for developing countries may be clear, but Open Access developments are also crucial as most academic institutions, whether in developing countries or not, are increasingly unable to afford high subscription fees which cannot be fully justified by the costs of the research and publishing process. It is almost common knowledge that it is less so academic researchers than commercial publishers who are to blame for this detrimental development.⁷ Authors want to maximise their audience and, accordingly, have their own interests, which do not always fully coincide with those of commercial publishers who need paywalls to make profits.

The definition of Open Access given as a starting point is thus one-sided, as it seems to be limited to readers and does not pay much attention to the possible benefits for authors looking for useful publishing channels. As far as authors are concerned, it is plausible that their Open Access articles have a potential for increased visibility, use, and citations by a large number of readers. Open Access journals of sufficient quality may furthermore be publishing

investigation, prosecution and adjudication of core international crimes and in the defence of persons accused of them, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so'.

6 The audience interested in international criminal law, a new field of international law, is heterogeneous in so far as it consists of practitioners and academics. Cf. M.J. Christensen, 'Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field' (2014) *iCourts Working Paper Series, No. 14*, online at <<http://ssrn.com/abstract=2539048>> or <<http://dx.doi.org/10.2139/ssrn.2539048>>, accessed 12 August 2016.

7 F. Baetens and C. Wui Ling, 'Being an international law lecturer in the 21st century: where tradition meets innovation', 2 *Cambridge Journal of International and Comparative Law* (2013) 974–1011, at p. 992: 'Take journal publishing practices as an example. The researcher does not require any fee for turning over his or her research findings and article to the publisher. He or she considers him - or herself remunerated for the research through his or her salary from his or her academic institution. Research costs are usually covered by the researcher's academic institution or external funding sources. Upon being submitted to the journal concerned, the research article is assessed and refined by peer-reviewers and editors who are academics and provide these services without charge. Upon the article's acceptance and though the researcher does not receive any financial remuneration for the published article, he or she is required to sign over all copyright to the publisher concerned. By insisting on exclusive copyright and charging high subscription fees, the publisher limits access of the research article to those who can afford it'.

channels that are appropriate to contribute to the academic reputation of individual authors. 97 98

Many legal scholars want their work to be disseminated free of charge and as widely as possible so there is an increasing trend to push academic legal scholars to publish Open Access. However, making Open Access a main requirement for publicly funded research could directly affect academic independence and freedom and, in particular, harm younger scholars.⁸ Open Access publishing cannot be the norm in legal scholarship for another reason which is that, compared to other academic disciplines, law journals that are freely available on the web are underrepresented as of yet.⁹ Arguably, the main cause of this small representation is the lack of established reputation and consistent quality as perceived for Open Access journals in the legal domain.¹⁰ 99 100 101 102 103 104 105 106 107 108

3 The Legal Tools Database 109

The Legal Tools Database¹¹ is an exemplary Open Access source for all tribunals in the field of international criminal law. The Legal Tools Database is a service owned by a permanent public international organisation, which has no commercial interests in the Database. This database provides free online access to more than hundred thousand legal sources and experienced at least two million visitors in 2015. Consequently, it has been observed 'This can be of 110 111 112 113 114 115

8 C. Stahn and E. De Brabandere, 'The Future of International Legal Scholarship: Some Thoughts on "Practice", "Growth", and "Dissemination"', 27 *Leiden Journal of International Law* (2014) 1–10, at p. 9: a strict Open Access policy might hurt younger scholars like PhD students or early career academics who require publication in peer-reviewed journals in order to build their profiles.

9 G.F Frosio, 'Open Access Publishing. A Literature Review', (2014) 1 *CREATE Working Paper*, p. 73, online at <<http://www.create.ac.uk/wp-content/uploads/2014/01/CREATE-Working-Paper-2014-01.pdf>>, accessed 12 August 2016.

10 Cf. T. Eger, M. Scheufen and D. Meierrieks, 'The determinants of open access publishing: survey evidence from Germany', 39 *European Journal of Law and Economics* (2015) 475–503, at p. 500: We have shown that the most important obstacle to more Open Access publications is the lack of reputation of these journals. There are a few disciplines (e.g., 'Biology & Life Science', 'Health Science' and 'Physics & Astronomy') with a number of highly reputed Open Access journals. In most other disciplines, however, authors are not motivated to spend time and effort to publish Open Access, since there is no benefit in terms of reputation.

11 See online at <<https://www.legal-tools.org/>>, accessed 12 August 2016. In fact, 'Legal Tools Database' is an abbreviation for 'ICC Legal Tools Database' of the International Criminal Court (ICC).

distinct practical importance to users with limited access to proprietary legal information (such as subscription-based databases or journals, or expensive publications).¹²

The Legal Tools Database is a document system that has been qualified as 'the leading online resource for legal sources in international criminal law. It provides free online access to most legal documents that may be relevant to cases involving core international crimes ... The Database is a victory of the ideas of open and free access to legal information and of legal information as public goods.'¹³ Leaving aside the question whether this cheering claim is fully correct, it is pretty clear that the Legal Tools Database illustrates the great potential of Open Access.

The Legal Tools Database is a single-stop location that is comprised of thirteen in-depth collections of documents. The list below indicates the extended coverage of this Open Access source:

- International Criminal Court Documents: basic legal documents and the public decisions;
- International criminal court 'Preparatory Works' and Statute Amendments: more than nine thousand documents related to the negotiation of the International Criminal Court Statute, Rules of Procedure and Evidence, etc.;
- International legal instruments: a collection of key treaties;
- Other international law decisions and documents: documents of the International Court of Justice, International Law Commission, United Nations General Assembly and United Nations Security Council;

¹² *Building a Public Commons of Legal Sources in International Criminal Law*, online at <https://www.casematrixnetwork.org/fileadmin/_migrated/content_uploads/151117_LTD_leaflet_Second_Edition.pdf>, accessed 12 August 2016.

¹³ See <<http://www.casematrixnetwork.org/icc-legal-tools-database/>>, accessed 12 August 2016. See also Bestafka-Cruz, *supra* note 2, p. 579: 'This system has developed out of the ongoing work of the ICC and having a need to collect the jurisprudence of different national and international criminal tribunals. As such, the database has collected documents from both national courts and the tribunals covered by this guide. Through its browsing-based system, the database allows a researcher to look through categories of information and find independently stored files of documents relevant to international criminal law. In a way, the tool has become a sort of single-stop location for many files from different tribunals. Because of this, the system seems like an ideal model for what might be a centralized document system for all UN criminal tribunals in the future, thereby making research significantly more uniform'.

- Human rights law decisions and documents: decisions of the European Court of Human rights and Inter-American Court of Human Rights, and documents of the United Nations human rights system; 139
- International(ised) criminal jurisdictions: basic legal documents of all international(ised) criminal jurisdictions; 140
- International(ised) criminal decisions: public decisions of the international(ised) criminal jurisdictions; 141
- National jurisdictions: basic documents on the legal system and status of core international crimes; 142
- National implementing legislation: national implementing legislation, including access to the specialised National Implementing Legislation Database; 143
- National Cases Involving Core International Crimes: the largest collection of such case documents; 144
- Publications: publications relevant to work on international criminal law; 145
- United Nations War Crimes Commission: the public part of the archive of the United Nations War Crimes Commission; 146
- International(ised) Fact-Finding Mandates: documents on international (ised) fact-finding mandates.¹⁴ 147

Evidently the Legal Tools Database is a great collection of reference documents and case law, so it is safe to consider the Legal Tools Database as the most important Open Access source of international criminal law. It is frequently consulted by defence counsel in preparation for filings and courtroom appearances and it is used to find precedents in other international criminal law cases, or to understand how statutes and rules have previously been applied. For these reasons, the Legal Tools Database is invaluable to many scholars of international criminal law.

In this section, the International Crimes Database¹⁵ has to be mentioned as a database that complements the Legal Tools Database. The International Crimes Database covers primary sources of law and it offers a comprehensive database on international crimes. The database, hosted and maintained by the T.M.C. Asser Institute in The Hague, has a broad scope and aims to provide as much information as possible and to facilitate free access for students,

14 See <<https://www.legal-tools.org/what-are-the-icc-legal-tools/>>, accessed 12 August 2016.

15 See <<http://www.internationalcrimesdatabase.org/>>, accessed 12 August 2016. See also G. Partin, 'International Criminal Law', *Electronic Resource Guide*, online at <https://www.asil.org/sites/default/files/ERG_CRIM.pdf?v=1>, accessed 12 August 2016, p. 4.

172 reporters, victims, and lawyers. In addition to case law on international crimes,¹⁶
 173 the website incorporates general background information about international
 174 crimes, scholarly as well as news articles, working papers (ICD Briefs), and rel-
 175 evant links.

176 The Legal Tools Database and the International Crimes Database provide
 177 core information related to tribunals and are not really dedicated to academic
 178 publishing channels. Therefore, the next section of this paper will discuss spe-
 179 cial tools to detect Open Access journals.

180 4 Finding Open Access Journals

181 To retrieve articles published in Open Access journals, specific search engines
 182 that are dedicated to Open Access, international criminal law, or both, are use-
 183 ful to locate, read, and download relevant scholarly journal articles at no cost.
 184 These search engines are particularly useful if they have been developed by
 185 professionals or organizations of high reputation. Such is the case with three
 186 tools: (a) Directory of Open Access Journals, (b) Free Full-Text Online Law
 187 Review/Journal Search, and (c) Annette's Open Access Law Reviews and Com-
 188 mentary MetaSearch. Before detailing these tools, it has to be stressed that
 189 the choice of suitable search terms is crucial to find as many relevant sources
 190 as possible.¹⁷ Still, journal articles and other secondary sources retrieved via

16 Bestafka-Cruz, *supra* note 2, p. 561: 'Judgments form the most central type of informa-
 tion related to the tribunals as they are, after all, the purpose for a tribunal's existence.
 As a result, researchers looking into various types of questions may find it useful, or in
 many cases necessary, to look into the case law of a tribunal. From understanding the
 interpretations of laws to getting facts about what occurred during the conflicts that gave
 rise to the tribunals, judgments are an invaluable source in getting access to objective and
 extremely detailed information. Because these documents are so central, each court will
 make a prominent part of the tribunal website geared to accessing these documents. For
 the older and more established tribunals, the system will often use a search engine while
 younger or smaller tribunals will use a browsing system. This in part is due to the volume
 of documents available thus far, but it also is a result of the time the tribunal has had to
 establish systems for research. Regardless of the type of system though, a tribunal's web-
 site is almost always the most up-to-date and comprehensive location for a researcher to
 explore case law'.

17 Bestafka-Cruz, *supra* note 2, p. 521: '[it is important] to include as many variations of
 terms as possible both in regard to key concepts and in the names of institutions. Syn-
 onyms like tribunal, court, chambers, war crimes, crimes against humanity and others
 are terms that are often used interchangeably. To ensure one's research captures a wide
 portion of relevant materials, a researcher should look at ways terms may be varied and

search engines always require careful evaluation for authority, content, and topicality. 191
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The generic (a) Directory of Open Access Journals¹⁸ is a valuable indexing service to be mentioned first. Notably, the Directory of Open Access Journals can not only be used to check whether a journal is full-fledged Open Access but also to retrieve Open Access articles, for example about 150 articles on different aspects of human trafficking, though the system may be misleading.¹⁹ Although the Directory of Open Access Journals is not a search engine that is solely dedicated to legal journals; it contains almost 140 legal journals including a few journals that can be classified as pertaining to international criminal law.²⁰ The small number of law journals that are freely available on the web is disappointing, but, as far as the Directory of Open Access Journals is concerned, this may be ascribed to the fact that this indexing service is selective. For example, this tool fails to point at the multilingual *Zeitschrift für Internationale Strafrechtsdogmatik*.²¹ This Open Access journal was established in 2006 205

combined to enlarge the search results. In doing so, it should be kept in mind though that broader terms will result in broader and larger results whereas narrower terms will tend to lead to more discrete and fewer results'. And p. 524: 'One of the most overlooked nuances of researching the tribunals is the difference between British English and American English'.

18 See <<https://doaj.org/>>, accessed 12 August 2016; see also <<https://doaj.org/about>>, accessed 12 August 2016. The Directory of Open Access Journals aims to be comprehensive and covers over 9000 quality Open Access peer-reviewed academic journals; almost 6400 journals are searchable at article level.

19 Bestafka-Cruz, *supra* note 2, p. 537: 'Although the system allows one to search directly for articles, the system can be a little misleading as it does not necessarily search into each journal the database has access to. As an example, the Duke Journal of Comparative and International Law may be accessed through the database. By following that link to the journal's website, one can search for 'international tribunal' in the archives of the journal and find an article on the relationship between national and international courts in prosecuting war crimes. But, if one searches even the title of the article in the DOAJ system, it will result in nothing. Because of this, researchers can search the system for keywords or abstract descriptions, but to fully explore the collection, one will need to enter into journals of interest and search using each journal's archive or search system'.

20 E.g. *Anuario Iberoamericano de Derecho Internacional Penal*; *Bergen Journal of Criminal Law and Criminal Justice*; *Diritto Penale Contemporaneo*.

21 Or *Review of International Criminal Law Doctrine*; on: <<http://www.zis-online.com/>>, accessed 12 August 2016.

to pay attention to the 'Europeanization of criminal law' and to cover German and international criminal law as well as criminal procedure law.²²

In brief, the Directory of Open Access Journals is a useful tool, but it does not cover all relevant Open Access journals. To be more or less complete, it is necessary to conduct metasearches as well. This is an alternative approach involving metasearch engines that apply sophisticated algorithms to cover more search engines and to combine their results.

The first metasearch engine which can be used to retrieve free international criminal law journals is available on the website of the American Bar Association and is called (b) Free Full-Text Online Law Review/Journal Search.²³ This free engine searches the free full-text of over 400 online law reviews and law journals as well as document repositories hosting academic papers, such as the Social Science Research Network.

A Canadian law librarian, Annette Demers,²⁴ developed another search engine to retrieve free international criminal law journals: (c) Annette's Open Access Law Reviews and Commentary MetaSearch.²⁵ Like the American Bar Association's search engine, Annette's Open Access Law Reviews and Commentary MetaSearch is a Google Custom Search. It is important to note that the scope of both tools is not identical but complementary. Annette's Open Access Law Reviews and Commentary MetaSearch is not restricted to journals or papers. It covers the BePress Law Commons Network and the BePress Law School Institutional Repositories, but contrary to the American Bar Association's search engine, Annette's Open Access Law Reviews and Commentary MetaSearch excludes the Social Science Research Network.²⁶

²² See <<http://www.zis-online.com/?sektion=4&sektionsub=1&language=eng>>, accessed 12 August 2016.

²³ See <http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/free_journal_search.html>, accessed 12 August 2016.

²⁴ See <<http://www.uwindsor.ca/law/library/277/annette-demers-acting-law-librarian-and-sessional-lecturer>>, accessed 12 August 2016.

²⁵ See <https://cse.google.com/cse/publicurl?cx=015927997327406776761:rrg_-rml78a>, accessed 12 August 2016.

²⁶ The webpages included in Annette's MetaSearch are an interesting collection mainly in English, but they do not exclusively cover international criminal law journals as illustrated by the following list of websites: BePress Law Commons Network, BePress Law School Institutional Repositories, *Centre d'accès à l'information juridique* (CAIJ), Cornell Law School Working Papers Series, Dalhousie Journal of Legal Studies, Directory of Open Access Journals—Law, Duke Law Scholarship Repository, European Integration Online Papers, *European Journal of International Law*, European Research Papers Archive, *International Review of the Red Cross*, JurisBistro, Law Review Commons, *Manitoba Law Journal*, *McGill Law Journal/Revue de droit de McGill*, New England Law Library Consortium (NELLCO)

5 Open Access Publishing Channels 230

Authors looking for publishing channels do not always have the same interests as readers of already published papers. Therefore, some guidance will be given on useful and trustworthy publishing channels, paying attention to the fact that authors looking for Open Access publishing channels have a few options: to use repositories, to buy off individual articles, or to ascertain that the journal is full-fledged Open Access. In this context, copyright is an important issue since publishing licenses may restrict Open Access options. In this section on publishing channels, the Social Science Research Network is a subject repository that will be described first to show how it allows preprints that have not been fully finalised for publication in journals.

The Social Science Research Network²⁷ is an Open Access subject repository that provides an overarching online archive of academic papers in particular subject areas. It consists of a number of specialised research networks in each of the social sciences; the Legal Scholarship Network is one of these subdivisions. Abstracts published via the Social Science Research Network are indexed by major online search engines like Google. Any paper an author uploads to the Social Science Research Network is downloadable for free, worldwide. To some degree, the public download counts listed on the site serve as an indicator of reader interest in an author's work. Academic or working papers can be uploaded directly to the site free of charge.²⁸ Moreover, authors retain copyright as the Social Science Research Network does not take a copyright for any papers posted.²⁹

Legal Scholarship Repository, including Harvard (DASH), Columbia (Academic Commons) and New York University (Faculty Digital Archive), Osgoode Digital Commons, *Ottawa Law Review/Revue de droit d'Ottawa*, *Queen's Law Journal* (current issue embargoed), *Revue du Barreau*, *Revue de droit de l'Université de Sherbrooke* (RDUS), University of Alberta's Constitutional Forum and Review of Constitutional Studies, Western University's *Western Journal of Legal Studies*, *Windsor Yearbook of Access to Justice*, WorldLII - International Legal Scholarship Library, online at <http://www.uwindsor.ca/law/library/sites/uwindsor.ca.law.library/files/list_of_websites_searched_1.docx>, accessed 12 August 2016.

27 See <<http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm>>, accessed 12 August 2016.

28 See step-by-step submission instructions to submit or revise submissions to SSRN's eLibrary, online at <http://ssrn.com/update/general/ssrn_faq.html>, accessed 12 August 2016.

29 Frequently Asked Questions, Submitting a Paper to the SSRN eLibrary (11) What do I need to know about Copyright Policies?, online at <http://ssrn.com/update/general/ssrn_faq.html>, accessed 12 August 2016.

To increase distribution speed, legal papers may be first published as pre-prints on the Social Science Research Network before being submitted to an academic journal that applies mechanisms like peer review to improve quality. However, policies of journals to publication on the Social Science Research Network may vary and there is a wide diversity of approaches, as some journals may oppose publication of preprints and other journals may ask for an embargo period before the article can be distributed on the Social Science Research Network.³⁰ In sum, the Social Science Research Network is an attractive Open Access publishing channel to reach an audience not barred by paywalls, and, due to its emphasis on working papers, the Social Science Research Network is a useful current awareness service, but the search function is not ideal since the Social Science Research Network does not search full text.³¹

Repositories like the Social Science Research Network and journals like the *Bergen Journal of Criminal Law and Criminal Justice* are completely Open Access. Apart from these Open Access publishing channels, there are so-called 'hybrid' journals that are not full-fledged Open Access but offer the opportunity to publish selected articles in Open Access. In hybrid Open Access journals like the *International Journal of Transitional Justice*, the *International Criminal Law Review*, and the *European Journal on Criminal Policy and Research*, some of the articles are in Open Access and the remaining articles are only accessible

³⁰ Frosio, *supra* note 9, pp. 67–68.

³¹ Bestafka-Cruz, *supra* note 2, p. 536: 'SSRN is a unique service that collects academic writings and papers in work as submitted by authors. The nature of the collection allows its sources to be very timely and cutting edge as they are available often before the articles are officially published. As a result, the service allows researchers to have a sneak peek at upcoming publications, arguments, and materials that may be relevant to the area they are interested in. The use of a search engine system allows the collection to be very user-friendly for new researchers as they can search across topics, keywords, articles and other information to find either general information or specific types of articles. Furthermore, as the nature of the tribunals involve rapidly developing areas of law (in comparison to other types of law), these working papers can be invaluable in giving researchers an idea of the changing areas without requiring a fee as many journal collections require for already published materials ... Because of the extent of the database, there is a balance to strike between the use of broad search terms when looking for general information and yet still having a narrow enough search so as to still make sure the results are closely connected to the international tribunals. In using the tool, researchers should be careful to avoid terms that may include results outside of the UN criminal tribunals (such as only searching for "international" and "tribunals") since the database will likely include papers written on other topics with those words. In part, because the database does not search full text, the results can be filtered by instead strategically searching in titles and abstracts.'

for individuals or institutions having paid their subscriptions. To get their articles in Open Access, individual authors usually have to pay article-processing charges, but there is an alternative that shifts this financial burden to institutions. This option can be illustrated with a Dutch scheme: in the Netherlands, an agreement on transition to Open Access reached with Springer³² serves to collectively buy off article processing charges for individual articles by all corresponding authors at universities. As a result, individual authors will no longer have to pay for Open Access publications in journals such as the *European Journal on Criminal Policy and Research*.

As said, if a collective buy-off has not been arranged, the author has to pay article processing charges for individual articles, although many argue this perpetuates the traditional subscription model since the publishers involved still charge institutions to make the very same hybrid journals available. The level of the amounts involved can be illustrated for two leading journals covering international tribunals: the *International Journal of Transitional Justice* (published by Oxford University Press) and the *International Criminal Law Review* (published by Brill Nijhoff). For the first journal, the regular Open Access charge applicable is EUR 2450;³³ and for the second title publication charges rates depend on the license opted for: either EUR 1330 or EUR 1995.³⁴ Payment of the higher amount allows everybody to sell or translate the article without permission, thereby reducing expected income for Brill, the publisher.

In the process of looking for full-fledged Open Access publishing channels, authors may be inspired to submit their papers to legal journals following the Open Access Law Principles.³⁵ To promote Open Access, these principles

32 Agreement with the Association of Dutch Universities and Academy Institutes: <http://www.springer.com/gp/open-access/springer-open-choice/springer-compact/agreements/42388>, accessed 12 August 2016.

33 See <http://www.oxfordjournals.org/our_journals/ijtj/for_authors/>, accessed 12 August 2016.

34 EUR 1330 for CC BY NC licenses or EUR 1995 for CC BY licenses <<http://www.brill.com/about/open-access/publication-charges>>, accessed 12 August 2016. The CC BY and the CC BY NC licenses are rather common standard licenses and will be explained hereafter.

35 See <<http://sciencecommons.org/projects/publishing/oalaw/principles>>, accessed 12 August 2016. The principles have been formulated by Professors Dan Hunter and Mike Carroll, <<https://blog.creativecommons.org/2005/06/06/creativecommonsandscience-commonsannounceopenaccesslawprogram/>>, accessed 12 August 2016; Frosio, *supra* note 9, p. 72: The Open Access Law Journal Principles have been promulgated in 2005. Science Commons is overseen by members of the Creative Commons board <<http://sciencecommons.org/about/whoweare/>>, accessed 12 August 2016. Not that many law journals have adopted the Open Access Law Journal Principles or have policies consistent with

include some requirements that strike an acceptable balance between authors' rights and publishers' interests, thereby giving the authors sufficient control of their works:³⁶

- 1) The journal will require from the author no more than a reasonable, limited-term exclusive license for commercial publication.
- 2) In the event of reprinting or republication (of any part) of the article the author will always ascribe first publication to the journal, unless the journal does not require this.
- 3) Upon publication of the article, the journal will make available to the author an electronic version of the edited article—a citable copy of the final version such as the PDF or the Word processing document of the published article.

Remarkably, the Open Access Law Principles do not reject the transfer of intellectual property rights to commercial publishers although authors may prefer to retain their copyright in order to ensure that they are allowed to make their work freely available via the internet with minimum or no legal restrictions attached to their work.³⁷ The remedy is elsewhere: Creative Commons licenses offer an easy and increasingly common way for copyright holders to manifest their consent to Open Access. Various Creative Commons licenses have been coined to define different levels of public access, to communicate reader, reuse, and redistribution rights and to facilitate the choice of appropriate

them, <https://wiki.creativecommons.org/wiki/Open_Access_Law_Adopting_Journals>, accessed 12 August 2016.

36 "The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited" <<http://www.budapestopenaccessinitiative.org/read>>, accessed 12 August 2016. Ten years after this requirement was first promulgated in the 2002 Budapest Open Access Initiative, this requirement was reaffirmed: <<http://www.budapestopenaccessinitiative.org/boai-10-recommendations>>, accessed 12 August 2016.

37 Cf. B.L. Frye, C.J. Ryan and F.L. Runge, 'An Empirical Study of Law Journal Copyright Practices', (2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767875>, accessed 12 August 2016, p. 21: 'This empirical study of the copyright practices of American law journals shows that many law journals have adopted copyright policies that are inconsistent with open access publishing and fair use doctrine. Many law journals stated that their copyright policies require assignment of the copyright in the articles they publish, which may conflict with open access publishing. Many law journals stated that their copyright policies prohibit alternative distribution of articles before or after publication, which directly conflicts with open access publishing.'

restrictions.³⁸ The Creative Commons licenses are well established legal instruments for authors or right holders to visualise which rights to reuse the work have been granted since Creative Commons defines conditions of reuse and provides this legal information to users.

Probably, the CC BY license complies most with Open Access as it allows users to copy, distribute, and transmit the article, to adapt it and to make commercial use of it. One can, for example, publish a translation of an article without asking permission from the original author. Particularly, the CC BY license permits commercial and non-commercial re-use of an Open Access article, as long as the author is properly attributed. To a certain extent, the CC BY NC license is more protective since it restricts reuse of the article to non-commercial use (hence the NC) and forbids commercial use. Although the definition of what constitutes commercial is vague, it is pretty clear that it is not allowed to resell the article or to reuse it in a commercial publication.

To check to what extent publishers suggest or impose the use of licenses, including Creative Commons licenses, Sherpa/Romeo³⁹ has to be mentioned as a special tool to ascertain the diverse publishers' policies for self-archiving and reuse of their journals. This website is of importance for authors who want to promote Open Access and who want to know whether their article will become free of most copyright and licensing restrictions without giving users the right to do whatever they want with accessible publications.

Sherpa/Romeo is a useful starting point to examine a journal's policies as it gives more information than the Directory of Open Access Journals, one of the sources providing journal information used by Sherpa/Romeo. Although the Directory of Open Access Journals lists e.g., the *Bergen Journal of Criminal Law and Criminal Justice* as an Open Access journal for international criminal law, this may only mean that it does not require any subscription payment and that its content is freely available to read. To what extent self-archiving and reuse are allowed can be checked in Sherpa/Romeo to start with; an appropriate Creative Commons license can exclude uncertainty in this regard.

³⁸ Creative Commons licenses <<https://creativecommons.org/licenses/>>, accessed 12 August 2016. Cf. Baetens and Wui Ling, *supra* note 7, p. 994: 'most researchers do not have the know-how or time to design licensing alternatives with which they can enter into negotiations with publishers. Recognising this, a non-profit company has developed a range of Creative Commons Licenses with which researchers can secure different levels of public access to their work. This still requires the researcher to be willing to take the time to negotiate with the publisher concerned and the publisher to be willing to make exceptions to the journal's publishing practices'.

³⁹ See <<http://www.sherpa.ac.uk/romeo/index.php>>, accessed 12 August 2016.

348 However, the coverage of Sherpa/Romeo is limited, as law journals are sparsely
 349 represented within this directory.⁴⁰ Consequently, checking the website of the
 350 journal publisher concerned will be decisive in many cases; if not, the editor
 351 has to be asked permission for self-archiving and reuse.

352 6 Quality of Open Access Journals

353 Although Open Access journals may be perceived as suffering from a lack of
 354 reputation or from insufficient quality, making potential authors reluctant
 355 to choose these publication channels, Open Access journals can be first-rate.
 356 Generally, the quality of a scholarly journal, Open Access or not, is mainly a
 357 function of its authors, editors, and reviewers. However, apart from the fac-
 358 tors determining the quality of Open Access journals, there may be reasons
 359 for special concern as to whether questionable Open Access publishers can
 360 be trusted. Before discussing an approach to assess the quality of Open Access
 361 journals, a method to exclude unreliable journals has to be mentioned.

362 Publishers who call themselves 'Open Access' may send unsolicited bulk
 363 e-mail in order to entice academics to become editorial board members, to
 364 submit their articles, and to attend and speak at conferences. These publishers
 365 try to convince researchers that a high impact factor journal invited them to
 366 publish their work with the peer review process done within just a couple of
 367 weeks. Fortunately, when in doubt of the quality of an Open Access journal
 368 promoted in that way, the author of a paper can use Beall's list⁴¹ to check or
 369 exclude questionable publishers or predatory Open Access journals. So far, ap-
 370 proximately five legal journals feature on Beall's list, but that underrepresenta-
 371 tion has to be ascribed to the relative unpopularity of Open Access journals in
 372 the legal domain compared to other disciplines. This underrepresentation is of
 373 course no convincing evidence for the quality of any Open Access journal in
 374 the field of international criminal law.

40 There are reasons to believe that the number of Open Access legal journals will increase. Cf. M. Robinson and A. Scherlen, 'Publishing in Criminal Justice: Assessing Journal Editors' Awareness and Acceptance of Open Access', 4 *International Journal of Criminal Justice Sciences* (2009) 98–117, at p. 115: 'editors of journals in the fields of criminal justice and criminology may very well be open to seriously considering making their journals Open Access at some time in the future; at the least, they are willing to consider it', <<http://www.sascv.org/ijcjs/robinsonschlerlenijcjs2009.pdf>>, accessed 12 August 2016.

41 See <<http://scholarlyoa.com/individual-journals/>>, accessed 12 August 2016.

It is possible to measure the quality of hybrid Open Access journals mentioned earlier i.e., journals that are not full-fledged Open Access but offer the opportunity to publish selected articles in Open Access. Many ranking systems, incorporating a variety of methodologies and factors, have evolved to compare the prestige of hybrid journals. One of these systems is the SCImago Journal Rank indicator, which may determine the relative quality of hybrid journals according to the ranking of these journals.⁴² The SCImago Journal Rank indicator is a measure of scientific influence of scholarly journals that accounts for both the number of citations received by a journal and the importance or prestige of the journals where such citations come from.

Focusing on international criminal law, the SCImago Journal Rank indicator ranks the *International Journal of Transitional Justice* (first quartile) higher than two other hybrid journals (second and third quartile) on a list of 505 law journals in total compiled for the year 2015. As shown in Table 1, the higher position runs parallel with the citation by document average in three years. To some extent, the higher position of the *International Journal of Transitional Justice* seems to justify the higher Open Access charge (EUR 2450) compared to the article processing charges (EUR 1330 or EUR 1995) required for the *International Criminal Law Review*.

The ranking of journals is important but should not be decisive when it comes to identifying a publishing channel. Predominantly, a topical fit or match of contents is needed as it is almost obvious that a journal will not accept manuscripts that lie outside its subject area. This means that, in order to increase the chances to have one's paper published, information about the audience and the scope of the journal is needed. The following comparison of the three journals mentioned above may illustrate how subtle the details may be. The *International Journal of Transitional Justice*⁴³ covers transitional

⁴² <<http://www.journalmetrics.com/sjr.php>>, accessed 12 August 2016. The SCImago Journal Rank indicator covers 50 legal Open Access journals; including 7 titles in the first quartile and 12 titles in the second quartile, thereby illustrating that some legal Open Access journals can be first rate. See <<http://www.scimagojr.com/journalrank.php?category=3308&openaccess=true>>, accessed 12 August 2016.

⁴³ This journal 'publishes high quality, refereed articles in the rapidly growing field of transitional justice; that is the study of those strategies employed by states and international institutions to deal with a legacy of human rights abuses and to effect social reconstruction in the wake of widespread violence. Topics covered by the journal include (but are not limited to): truth commissions, universal jurisdiction, post-conflict social reconciliation, victim and perpetrator studies, international and domestic prosecutions, institutional transformation, vetting, memorialization, reparations and ex-combatant reintegration'. <<http://ijtj.oxfordjournals.org/>>, accessed 12 August 2016; "Transitional justice" is defined

TABLE 1 *Three hybrid journals according to scImago Journal Rank indicator*

Rank (2015)	Title of hybrid Open Access journal	Quartile	Total citations received (2012–2014)	Citable documents published (2012–2014)	Average citations per document (2012–2014)
60	<i>International Journal of Transitional Justice</i>	1	131	63	2.079
168	<i>European Journal on Criminal Policy and Research</i>	2	68	78	0.872
265	<i>International Criminal Law Review</i>	3	34	102	0.333

justice; that is the study of those strategies to deal with a legacy of human rights abuses and to effect social reconstruction. The *European Journal on Criminal Policy and Research*⁴⁴ sheds light on the European dimension of crime and

broadly so as to engage with a wide spectrum of civil society and government initiatives. This is of particular importance as the field itself continues to grow and evolve in concept and scope'. <http://www.oxfordjournals.org/our_journals/ijtj/about.html>, accessed 12 August 2016; and, finally: 'A central aim of the journal is to encourage debate and discussion across disciplines and geographic areas. Articles which bridge the academic-practitioner divide and represent a range of voices, including those of civil society and policy-makers, are encouraged'. <http://www.oxfordjournals.org/our_journals/ijtj/for_authors/>, accessed 12 August 2016.

- 44 This journal 'monitors crime trends in today's enlarged Europe and beyond. The focus of its peer-reviewed coverage is on understanding crime in different geographical and socio-economic contexts, on presenting innovative crime prevention policies and practices, and on following legislative and institutional change. Discussion includes the trade-off between security and rights and ways to optimize the effectiveness of criminal justice systems with respect to human and civil rights. Recognizing that criminal justice systems are not the only method for dealing with crime, the journal also devotes attention to alternative policies and practices'. And below the heading Aims and Scope: 'The Journal focuses on the European dimension of crime and looks at its research and policy implications'. However, the following has been annotated: 'making Europe the focus of the Journal does

425 sources. These Open Access sources are often scattered, but there are some
426 useful dedicated search engines covering various virtual collections. Using
427 these search engines, researchers can locate scholarly journal articles and find
428 publishers' policies for reuse of their journals. This confirms the fact that the
429 inventory of Open Access sources noted in this study illustrates that Open Ac-
430 cess publishing could benefit international criminal law research. It is beyond
431 a doubt that the Social Science Research Network is a useful current awareness
432 service due to its increased distribution speed. Last but not least, Open Access
433 journals can be first-rate; central sources like the Legal Tools Database may
434 even be indispensable.
435